IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 440

UNITED STATES OF AMERICA,
Appellant,

vs.

EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEE EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO.

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EMPLOYING PLASTERERS ASSOCIATION OF CHICAGO, JOURNEYMEN PLASTERERS' PROTECTIVE AND BENEVOLENT SOCIETY, LOCAL NO. 5, O. P. & C. F. I. A., AND BYRON WILLIAM DALTON,
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OPINION BELOW.

The opinion of the court below (R. 17), the District Court for the Northern District of Illinois (Perry, J.), is unreported.

JURISDICTION.

The District Court on January 20, 1953, entered an order granting the appellees' motion to strike the appellant's complaint and dismiss the action (R. 20-21). Thereupon, on September 18, 1953, the appellant, invoking Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C., Section 29, as amended by Section

17 of the Act of July 25, 1948, 62 Stat. 869, procured an order of the District Court allowing an appeal to this Court (R. 21-22). This Court denied the appellees' motion to dismiss the appeal or affirm the conviction below and noted probable jurisdiction of the cause on November 30, 1953 (R. 24).

QUESTION PRESENTED.

The defendants are charged with conspiring to restrict persons from engaging in the business of furnishing and installing plastering materials in the Chicago area. There are no allegations in the complaint showing how or to what extent this has affected the flow in interstate commerce of plastering materials. There are no allegations that the quantity, quality, kind or price of plastering materials in the flow of commerce have in any way been affected. The question presented is whether the sum of the complaint's allegations with respect to restraint of competition in the installation of plaster totals a restraint upon the flow of plastering materials in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED.

The germane portions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1 and 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
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> * * * * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT.

With one exception, the Government's "statement" is substantially accurate.

At page 4 the Government states that "the complaint charged the defendants with conspiring to restrain interstate commerce in plastering materials shipped from outside the state of Illinois for installation in buildings in the Chicago area." This we deny. There is in terms no such allegation in the entire complaint. The very issue before the Court is whether the sum total of the allegations of the complaint constitute such a charge.[1]

The Government's statement also includes reference to all of the significant allegations of the complaint. We feel it should be made clear, however, rather than buried in a footnote, that there are 140 plastering contractors in the Chicago area, only 39 of whom belong to the defendant Association.

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1. It is alleged that one of the effects of the conspiracy has been that the flow in interstate trade and commerce of plastering materials "has been unlawfully restrained." (Par. 29, R. 8.) But this, we say, is a pure conclusion that cannot aid the complaint if it is otherwise defective.

The Government does state, and it is alleged (Par. 17, R. 5), that any restraint upon the performance of plastering work in Chicago necessarily and directly restrains and affects the interstate flow of plastering materials, but again we say that this is a pure conclusion.

SUMMARY OF ARGUMENT.

The business of plastering contractors, as alleged in the complaint, is peculiarly local and particularly adapted to local regulation and control. Conceding a flow in commerce to such contractors of plastering materials, the alleged restraints do not show a violation of Section 1 of the Sherman Act.[2] Agreements in the building trades relating solely to what persons can or will work and under what conditions have always been held to be outside of the Act. *National Fireproofing Co.* v. *Mason Builders' Ass'n*, 169 Fed. 259 (C. A. 2, 1909); *Industrial Ass'n* v. *United States*, 268 U. S. 64; *Levering & G. Co.* v. *Morrin*, 289 U. S. 103; *United States* v. *San Francisco Electrical Cont. Ass'n*, 57 F. Supp. 57 (N. D. Calif., 1944); *Albrecht* v. *Kinsella*, 119 F. 2d 1003 (C. A. 7, 1941). These holdings are bottomed on the sound doctrine that local government is in the best and most appropriate position to police local construction activities.

Conceding that purely local restraints can violate the Act, the complaint at bar signally fails to allege any ultimate facts showing an effect on interstate commerce, the *sina qua non* to such a violation. A local restraint must have a substantial and adverse effect on commerce before it offends against the Sherman Act. *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. The commerce here charged to have been restrained is in plastering materials.[3] The complaint contains no allegation that the quantity, quality, kind or price of such materials flowing into the state of Illinois have been in any wise affected as a result of the alleged conspiracy. It is therefore impos-

2. The charge of violation of Section 2 of the Sherman Act has been abandoned by the Government. Its Brief, No. 440, p. 4, n. 3.

3. Government's Brf., No. 440, pp. 2, 4.

sible to form a rational judgment as to whether there has been any substantial or adverse effect on the flow of such materials. The complaint thus plainly fails to state a cause of action and was properly dismissed by the District Court.

The conclusions pleaded in the complaint that interstate commerce has been restrained and burdened cannot cure its plain deficiencies in the allegation of ultimate facts essential to the statement of a cause of action. *United States* v. *Starlite Drive-In*, 204 F. 2d 419 (C. A. 7, 1953); *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519 (C. A. 10, 1950); *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (C. A. 4, 1934); *Mitchell-Woodbury Corporation* v. *Albert Pick-Barth Co.*, 36 F. 2d 974 (D. C. Mass., 1929), 286 U. S. 552; *United States* v. *Bay Area Painters and Dec. Joint Com.*, 49 F. Supp. 733 (N. D. Calif., 1943).

The Government seeks to avoid the impact of its failure to allege any effect upon the price, grade or flow of plastering goods by asserting an effect upon the number of local retail outlets for plastering goods. No reason or precedent, however, can justify the claim that a limitation upon an increase in retail outlets, the net effect of the defendants' acts with respect to outlets violates the Sherman Act. Cf. *Industrial Ass'n* v. *United States*, 268 U. S. 64. Past precedent holding local construction beyond the reach of the Sherman Act is still controlling so far as the present complaint is concerned. Cf. *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297. Reliance by the Government upon Labor Board cases in the anti-trust field is improper for Congress has delegated to the Labor Board all the powers it was granted by the commerce clause of the Constitution. *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 647; *Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 31, and *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607. The

Sherman Act is not, however, coextensive with the commerce clause. *Toolson* v. *New York Yankees, Inc. et al.*, No. 18, this Term, decided November 9, 1953; *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U. S. 460, 462; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 486.

This is not a case where the court is faced with the difficult task of weighing alleged effects on interstate commerce to arrive at a determination as to whether they are sufficiently substantial to bring the Sherman Act into play. This is a case where no effects at all are alleged.

ARGUMENT.

The Complaint Fails to Allege Any Facts Constituting a Restraint of Trade or Commerce in Violation of the Sherman Act.

Taken at its best, the essence of the complaint held inadequate by the lower court is that plastering materials flow in interstate commerce to plastering contractors; that by conspiracy an increase in their numbers has been restricted, the right to change their form of business organization limited, and competition between them restrained where one of their number has a dispute with a general contractor (Par. 20, R. 6). By way of conclusion it is alleged that these limitations restrain and burden commerce in plastering materials.

Because government counsel have attempted to treat the two matters as involving virtually identical charges and issues and in effect file a joint brief in the two matters, we feel it incumbent on us to point out that the gravamen of the charge in this case is strikingly different from that made in No. 439. There it is alleged that the number of lathing contractors has been sharply reduced, all competition between them eliminated, and the plastering contractors made victims of the alleged conspiracy.

Here materials are produced outside of the state of Illinois (Par. 10, R. 3). The producers are not alleged to be co-conspirators and there is no allegation that any producer has in any way been restrained or restricted in producing, selling or shipping materials into the state.

The materials are bought by dealers and by them sold to the contractors (Pars. 11-13, R. 3-4). The dealers are not alleged to be co-conspirators and there is no allegation

that any dealer has in any way been restrained or restricted in buying and selling materials.

The complaint is barren of any allegation that the quantity, quality, kind or price of the materials shipped into the state has been affected in any way whatsoever. The complaint even fails to allege the quantity and value of the materials shipped into the state.

Under these circumstances, we submit that the conclusion that commerce has been restrained and burdened is a *non sequitur,* adds nothing to the complaint, and does not cure its otherwise fatal defects.

We do not for a moment deny that plastering materials move within interstate channels; nor do we deny that the complaint here adequately alleges that interstate flow. We also readily concede that as a matter of law a complaint properly drawn can charge those engaged in local activity with restraining trade or commerce in violation of the Sherman Act. But we believe that the complaint here signally fails to charge these defendants with conspiracy to restrain in any manner the interstate flow of or commerce in plastering goods. The complaint describes only an agreement whose purpose and effect is to restrain the local trade of installing plastering materials.

A.

The installation of plastering materials is a local activity. Without more, restrictions on that activity do not violate Section 1 of the Sherman Act.

In the past, both this Court and lower federal courts have been asked to find local building tradesmen within Sherman Act sanctions. Invariably, however, the courts have held that the individual who assembles and shapes the raw materials he purchases into the buildings of his

community is not primarily the Federal Government's concern. Each decision reflects the wholesome attitude that the activities of the local building trades in purely local matters are peculiarly the problems of state and local governments—the bodies best able to supervise community building operation.

The earliest case holding the building trades to be local in operation is *National Fireproofing Co.* v. *Mason Builders' Ass'n,* 169 Fed. 259 (C. A. 2, 1909), where suit was brought because the plaintiff was precluded from entering the business of installing tile in the New York City area. The court held that an agreement relating to masonry work in New York City was not offensive to the Sherman Act because of a lack of an effect upon commerce. The net effect of the holding was to permit New York City to solve its own building construction problems, a task we submit it is still most appropriately able to do.

Chronologically, the next cases of importance that considered the applicability of Sherman Act provisions to local building are two opinions of this court, *Industrial Ass'n* v. *United States,* 268 U. S. 64 (1925), and *Levering & G. Co.* v. *Morrin,* 289 U. S. 103 (1933). The earlier case involved the activities of San Francisco contractors in the building trades who wished an "open shop" policy in their area. Any individual who did not adhere to an "open shop" policy was not permitted to purchase certain specified locally-produced building materials. This Court found the defendants not to be in violation of the Sherman Act, stating at page 82:

> The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in

> specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.

In the present case the alleged conspiracy and the acts complained of spent their intended and direct force upon the persons who would be permitted to plaster a wall in the city of Chicago. It is not even alleged that there was any "resulting diminution of the commercial demand" for plaster and there is no allegation that there was any reduction in the interstate flow of plastering materials. All the more reason to conclude here that any restraint on commerce was fortuitous and "so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In the latter of the two cases, *Levering & G. Co.* v. *Morrin,* a group of defendants were charged, as were those in the *Industrial Ass'n* and the *National Fireproofing* cases and as are the defendants here, with suppressing competition in a local industry. It was alleged that the defendants conspired to prevent various individuals from erecting structural steel in New York City and that such action violated the Sherman Act. This court apparently felt, however, that New York City was best able to handle problems of building within its corporate limits and held the defendants were not within the scope of the Sherman Act. The court said in that case (289 U. S. 103 at 107):

> Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use* of the materials was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of

the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U. S. 37, 46-47; *Anderson* v. *Shipowners Assn.*, 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 410-411; *United Leather Workers* v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457. The controlling application of these cases to the present one is apparent from the review of them in the later case of the *Industrial Assn.* v. *United States*, 268 U. S. 64, 77-78, 80-82.

Accepting the allegations of the complaint before the Court at their full value, it results in the present case that the sole aim of the conspiracy was to place restrictions on persons who could plaster a wall in Chicago, and "not for the purpose of affecting the sale or transit of materials in interstate commerce." Substitute "plastering materials" for "steel" and everything the court said in the *Levering* case is perfectly applicable to the case at bar.

It does not distinguish or make inapplicable these two decisions to say that in the instant case the defendants "closed outlets which are an integral part of * * * the movement in interstate commerce" and "eliminated competition in procuring the services of those necessary to complete the interstate movement."[4] In the *Industrial*

4. Government's brief, No. 439, p. 31. The Government apparently deems these statements applicable to No. 440 (Its brief No. 440 p. 14). However, although "competition in procuring the services of those necessary to complete the interstate movement" of lathing materials may be charged to have been eliminated in No. 439, that is certainly not the case in No. 440.

Ass'n. case the very end sought by the conspirators was the elimination of union shop outlets, and which reduced competition in procuring services necessary to the completion of the interstate movement of materials. The result of the restraints on or reduction in number of those outlets was to reduce the flow into San Francisco of such out-of-state products as plumbing supplies. Denying validity to the Government's argument that the local conspiracy thus restrained the flow of interstate goods in violation of the Sherman Act, the court stated (268 U. S. 64 at 80):

> But this ignores the all important fact that there was no interference with the freedom of the outside manufacturer to sell and ship or of the local contractor to buy. The process went no further than to take away the latter's opportunity to use, and therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote,—precisely such an interference as this court dealt with in *United Mine Workers* v. *Coronado Co., supra,* and *United Leather Workers* v. *Herkert,* 265 U. S. 457.

In the *Levering* case the purpose of the conspiracy, the elimination of particular individuals from the business of erecting structural steel, again decreased the number of individuals handling structural steel imported into the New York area; but again the court found the defendant's activities beyond the reach of the Sherman Act. It should follow that a mere limitation on increase in the number of local outlets for interstate commodities, without more, is insufficient to constitute a Sherman Act violation.[5]

Two lower federal courts have recently considered Sherman Act suits against defendants whose activities paralleled those of the defendants herein. Both courts held to the

5. Cases cited by the Government on *reduction* of outlets are discussed post. pp. 28-29.

view that the Sherman Act did not authorize the Federal Government to arrogate to itself the local community's housing and construction problems. In *United States* v. *San Francisco Electrical Cont. Ass'n.*, 57 F. Supp. 57 (N. D. Calif., 1944), Yankwich, J., held that individuals who assembled and installed electrical systems in San Francisco were not engaged in commerce. The defendants performed operations similar to those done by the instant parties as they purchased materials imported from other states, combined them into a mass in accordance with submitted specifications, and then installed the product so constructed.

In *Albrecht* v. *Kinsella*, 119 F. 2d 1003 (C. A. 7, 1941), a plastering contractor sued defendants identical to those found here—a plastering journeymen's union, officials of that union and an association of plastering contractors—for allegedly excluding him from the Peoria, Illinois, market. The plaintiff there, like the appellant here, sought to create the impression of a restraint upon commerce repugnant to the Sherman Act by tracing the flow of goods used in the plastering industry from foreign states to the contractors in Illinois. The court, however, affirmed the district court's order dismissing the complaint, the late Judge Evans saying at page 1005:

> Because the effect upon interstate commerce is remote and merely incidental and the object of the conspiracy was not directed against such interstate trade, but wholly against local trade, we must, under the decisions, hold that the case falls outside these acts. *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, 53 S. Ct. 549, 77 L. Ed. 1052; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L. Ed. 1311, 128 A. L. R. 1044.

We believe that there has been no change in our economic or political system that warrants a reversal of the

long-standing policy of recognizing that local officials have primary concern as to how construction goods are used within the states. The maintenance in our federal system of a proper distribution of police authority between state and national governments is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 513 (1940).

The use of construction materials by local building tradesmen, such as these defendants, still results in the creation of the homes, factories and office buildings of the community. The building trades are still peculiarly connected with the physical growth, welfare and development of the local community. The local government's vital interest in this complex is today manifested not only in zoning ordinances and building codes regulating the use to which materials may be put, but in regulation, control and restriction of *those who may install the goods*[6]—the

6. E. g., the City of Chicago has the power to enact a building code, license and regulate electricians and electrical contractors and license and regulate plumbers and plumbing contractors. Ill. Rev. Stat. 1953, Ch. 24, §§ 70.1, 95; Ch. 111¼, § 116.50. Illustrative of restrictions on who can be electrical contractors and who can be plumbing contractors in Chicago is Municipal Code of The City of Chicago, Chapters 86 and 162. For an indication of the minutiae contained in building codes and their extremely detailed regulations and restrictions, see *National Building Code,* 1949 Ed., National Board of Fire Underwriters, 85 John Street, New York, N. Y.; *Uniform Building Code,* 1946 Ed., Pacific Coast Building Officials Conference, 124 West Fourth Street, Los Angeles, Cal.; *Basic Building Code,* Building Officials Conference of America, Inc., 1950 Ed., 51 East 42nd Street, New York. For an indication of the extent to which such codes have been adopted throughout the nation, see *Building Regulation Systems in the United States,* February, 1951, Housing and Home Finance Agency, Office of the Administrator, Division of Housing Research, U. S. Govt.

very heart of this alleged conspiracy! Thus if, as alleged (Par. 20, R. 6), these defendants are suppressing competition among those who use or install plastering materials in Chicago, then that city is the authority peculiarly suited to deal with the problem.

Further, as the decisions have pointed out, realistically speaking, if there is a restraint upon the installation of construction goods in a local area, any effect upon commerce is so remote and indirect as to be incapable of measurement. (This may well account for the absence of specific allegations on this subject in the present complaint.) The real pinch of such restraints is limited to the area in which they are found and manifested by higher building costs, a decrease in construction operations, a housing shortage or unemployment. When such evils do appear, it is the local, and not the Federal Government, constantly keeping a weather-eye upon local construction operations through the issuance of building permits, the enforcement of building codes and the *issuance of permits to individuals to ply a particular construction trade,* that is best able to evaluate and cope with the situation.[7]

The effect of the Government's appeal here is to ask the court to overrule long-standing precedent and shift the primary responsibility for regulating local building trades to the National Government despite the fact that building operations uniquely affect the local scene. Thus the way

7. If, as the Government alleges (Par. 29, R. 8), the effects of the defendants' conspiracy have been either to impair one's traditional American right to become a plastering contractor or deny the public the benefits of competition in the construction industry, it is the local governments who are best suited and equipped to police or correct the situation. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940). An expansion of federal jurisdiction into local construction may create far greater evils than it will cure.

would be paved for the enactment of a federal building code or the licensing or policing of local journeymen and contractors by the Federal Government—both functions now the responsibility of the local community.

B.

The suppression of competition in the trade of installing plastering materials within the Chicago area does not warrant the complaint's conclusion that there has been restraint of or a burden on the flow of plastering materials in interstate commerce.

We believe it both obvious and demonstrated that the activity of plastering is purely local. We have conceded that a conspiracy to restrain a purely local activity can under certain circumstances violate the Sherman Act. The complaint here does allege a conspiracy to restrict increase in the number of persons that can participate in the local activity of plastering. It does allege a suppression of competition between plastering contractors in cases where there is a dispute between an original plastering contractor and a general contractor. It does allege a limitation on the right of contractors to change the form of their business organization. But these are the only restraints factually alleged. The issue thus is whether the complaint contains the allegations prerequisite to making such restraints of local activity a violation of Section 1 of the Sherman Act. We submit that the complaint is patently deficient in this regard.

The test of what the complaint must allege to state a cause of action may be found in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948), cited and relied upon by the Government. There the court announced (p. 233) that "judgment as to practical impeding

effects'' on commerce had supplanted such rubrics as local, indirect, remote, incidental, primary, direct and the like. It said (p. 234) that ''given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse * * * to constitute a forbidden consequence.'' In the application of this inquiry ''those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented'' are excluded as beyond the reach of the Act. Thus, since installing plaster is a purely local matter, the complaint to state an offense under the Sherman Act must allege facts showing more than a restraint on that local activity of installation—it must aver ultimate facts showing or constituting a substantial and adverse effect upon the interstate commerce in plastering materials. This it wholly fails to do.

There is no allegation in the complaint as to what the effect on the flow in commerce of plastering materials has been except the conclusory one that it has been ''unlawfully restrained.'' Surely this purely legal conclusion does not satisfy the *Mandeville Farms* test. Surely this does not spell out ''in the sum of the facts presented'' what the court can conclude is a ''substantial and adverse'' effect on the flow of plastering materials.

There is no allegation in the complaint as to the volume or dollar value of plastering materials flowing into the Chicago area.[8] There is no allegation as to whether any plastering materials have ever been prevented from flowing into the Chicago area. There is no allegation that the

8. There is an allegation that $15,000,000 worth of plastering business was done in 1951 (Par. 9, R. 3) but the complaint is silent as to what portion of this amount is represented by the cost or value of materials.

volume of such materials flowing into the area has been limited or reduced. There is no allegation that the prices of plastering materials have been in any way fixed or affected.[9] Absent such allegations, how can it be determined from the complaint whether there has been any effect on the flow of materials; let alone whether the effect has been substantial and adverse? Yet such a determination is essential to the basic issue of whether the complaint avers a restraint of sufficient import to offend against the Sherman Act. *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293 (1945); *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U. S. 460 (1949).

The Government asserts that "the charge of effect on interstate commerce [is not] defective by reason of failure to set forth a precise blueprint or detailed catalogue of such effect,"[10] asserting that "the allegations here are at least as specific as those held to be adequate" in the *Mandeville Farms* case. This is simply not the fact. In that case there were allegations that the conspirators agreed to pay uniform prices for the commodity going into commerce and that they had eliminated competition among themselves with respect to the price of raw sugar in commerce. The court commented that "the allegations are comprehensive and, for the greater part, specific concerning both the restraints *and their effects*" (334 U. S. 219 at 246, emphasis ours).

The complaint alleges that plastering materials are purchased from building material dealers in the Chicago area, who in turn purchase such materials from out-of-state

9. It is alleged in the complaint that an effect of the conspiracy has been to increase the cost of building construction in the Chicago area (Par. 29, R. 8). But that construction is not a product in commerce.

10. Its brief, No. 439, p. 22.

sources (Par. 11, R. 3). The complaint does not allege that those dealers or their out-of-state sources are coerced, threatened, boycotted or influenced in any way; does not allege that they are a part of or the victims of the conspiracy. The complaint does not allege that their business has been hurt or their numbers reduced. The complaint does not allege any attempt to control the quality, quantity, kind or price of the materials bought and sold by such dealers. Neither does it allege that such is the actual or likely effect of the conspiracy. As the complaint presently stands, there is no justification for the inference that there is not free and open competition in the buying and selling of plastering materials in the Chicago area because of the alleged conspiracy over the installation of plastering materials.

The Government's apparent answer to this riddle of how commerce is affected because of an alleged suppression of competition among installers of plastering materials in Chicago is evidently the contention that outlets for plastering materials have been substantially limited.[11] The impression is sought that such a limitation has for many years been held to be within the Sherman Act. The short answer to such an argument is that in every case where this and other courts have found trade journeymen or local builders not in violation of the Sherman Act, there was not merely a limitation on increase as in this case but an actual reduction of outlets for goods flowing in commerce. But that decrease in local outlets, absent any allegation or showing as to effect on price or flow of goods in commerce, has consistently been held not to be within the prohibition of the anti-trust laws. *Industrial Ass'n* v. *United States,* 268 U. S. 64, 80 (1925). And none of the

11. Government's brief, No. 440, p. 14; Government's brief No. 439, p. 25.

cases cited by the Government[12] hold to the contrary. In each of those cases the defendants were alleged or proved to have affected the price or the quantity of goods flowing in interstate commerce. Here there is no allegation that defendants attempted to or did in fact in any way manipulate price or flow of plastering goods, or that that was the actual or probable consequence of their acts. In so far as appears from the complaint, the entire local demand for plastering materials can be purchased at a price established in a competitive market.

Thus, to say that because there has been suppression of competition among those who install plaster in Chicago there is a restraint upon trade or commerce in plastering materials is to leave a hiatus between the fact alleged and the conclusion drawn. No restraint upon plastering goods whatsoever is alleged in the complaint, and therefore the conclusion that a restraint of trade has occurred stands naked and unsupported.

Either the Government knows what the effects of the charged conspiracy are on the flow of plastering materials—in which event it should be compelled to allege them—or it does not. If it knows the effects and has not pleaded them, or if it does not know them, the lower court and the defendants may be put to a lengthy and ultimately needless trial. The report issued by the 1951 Judicial Conference, spotlighting the vexatious problems the federal courts are now confronted with because anti-trust causes tend to become trial marathons,[13] points up why pleadings in Sherman Act cases should be specific. Trial courts then may in many instances be able to dispose of anti-trust litigation upon the pleadings and prevent a case defective in

12. Its brief, No. 439, p. 28; discussed post. pp. 28-29.

13. Judicial Conference of the United States. *Procedure in Anti-Trust and Other Protracted Cases* (1951).

ultimate fact from clogging the docket by consuming days or months of trial before its imperfections are disclosed.

If, on the other hand, appellant has here pleaded all the ultimate facts, it is asking for an extension of the anti-trust laws into a virtually unlimited field of activity of the most intrastate nature. Once the complaint at bar receives judicial approval, then every enterprise and pursuit, no matter how local its scope, no matter how limited its operation, no matter how insubstantial its effect on commerce, is within the reach of the Sherman Act. Then the local barber, the local shoemaker or the local tailor is brought within the orbit of the Act. A complaint would suffice that set forth a restriction between local tradesmen, a description of their trade, allege they purchase for use or resale either hair tonic, leather, needle and thread, or the like, allege that such goods move in commerce, and conclude, without further allegation, that their actions restrain the interstate flow of the product they purchase for use or resale.

Upon the trial of our hypothetical tradesmen, the Government would, as it undoubtedly contemplated doing here, prove a flow of commerce into the defendants' hands, prove the local restrictions complained of, and then be entitled to a decree without proving that the former is affected by the latter. Nothing would be left for the jurisdiction of the local authorities or the state anti-trust statutes, for in today's complex economy there is not an individual earning a living who does not utilize or consume some good that has been in commerce. We therefore submit that the approval of the complaint herein signals the destruction of all distinction between intra and interstate commerce. The authority of the Federal Government may not thus be stretched to the point of destroying the distinction which the commerce clause itself establishes between commerce among the states and the internal commerce of a state. The distinction between what is national and what is local in

the activities of commerce is vital to the maintenance of our federal system.

This is not the first occasion where the Government has left a yawning chasm between the facts it pleads and the conclusion it draws that trade has been restrained. In the very recent decision of *United States* v. *Starlite Drive-In,* 204 F. 2d 419 (C. A. 7, 1953), a pleading identical in approach to that presented here was sharply disapproved. As here, all the defendants were residents of and earned their living in Cook County, Illinois. All were owners or operators of drive-in theatres and it was charged that they had conspired to set the price of admission into drive-in theatres in Cook County. The Government concluded, without any allegation of fact showing how or to what extent, that this agreement among the defendants restrained the flow of motion picture films in commerce. There was no allegation that film producers or distributors were co-conspirators or in any way the victims of the conspiracy. There was no allegation that the agreement related to the films. It was merely alleged that the effect was that "the flow" of films had been "substantially restrained."

In sustaining the District Court's dismissal of the complaint for a signal failure to connect the acts alleged with the restraint concluded, the Court of Appeals said at pages 420-421:

> The substance of defendants' argument is that the "effects" thus alleged are mere conclusions of the pleader, without basis in the factual allegations. Such being the case, the allegations entitled "Effects" are not admitted by the motion to dismiss. We agree with this reasoning. * * * A decision, therefore, simmers down to the narrow question as to whether the price-fixing agreement charged has or could have any appreciable effect upon the flow of films in interstate commerce. It appears that the theory which the government embraces carries it into a field of speculation

> and conjecture, as is epitomized by the legal effects which the indictment alleges. No facts are alleged and it is not reasonably discernible how or in what manner the condemned agreement affected commerce. Certainly there is no basis for a claim that the movement of films in interstate commerce was either enhanced or diminished or that any discrimination resulted either to exhibitors in the procurement of films or to their patrons in viewing the films. Distributors were as free to deal with exhibitors, and the latter were as unfettered in the procurement of film as they would have been in the absence of the charged conspiracy. The agreement had nothing to do with the price which the distributor received for its film or the price which the exhibitor paid for it. The agreement was between local parties and related solely to a business that was typically intrastate in its nature. We agree with the District Court in its conclusion that the indictment was defective for failure to state a cause of action.

Other lower federal courts have also held that allegations charging a combination and conspiracy to restrain interstate trade and commerce are purely conclusions and are to be disregarded unless supported by well-pleaded facts describing a restraint and its effect. *Mitchell Woodbury Corporation* v. *Albert Pick-Barth Co.*, 36 F. 2d 974 (D. C. Mass., 1929), 286 U. S. 552; *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F. 2d 885 (C. A. 4, 1934); *United States* v. *Bay Area Painters and Dec. Joint Com.*, 49 F. Supp. 733, (N. D. Calif., 1943); *Feddersen Motors, Inc.* v. *Ward*, 180 F. 2d 519 (C. A. 10, 1950). The court in the most recent of these cases, *Feddersen Motors, Inc.* v. *Ward*, had the following to say about allegations such as the appellant presents here (p. 522):

> It alleged that the defendants formed a combination or conspiracy in restraint of interstate commerce. It further alleged that they combined and conspired to force plaintiff out of business as a dealer in Hudson automobiles. It further alleged that defendants had

discriminated against plaintiff in certain respects. And it further alleged that the effect of the unlawful acts and practices on the part of defendants was to burden, obstruct, and unduly restrain interstate commerce and trade in new Hudson automobiles. But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendants violated the act with harmful results to the public. No facts were alleged from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from Detroit, Michigan, into Colorado, or other destination; or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. The pleading was completely barren of any allegations from which it could be determined as a matter of law that the contemplated purpose, tendency, inherent nature, or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in interstate commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest. Failing to contain allegations of that requisite nature, the pleading was insufficient in law to state a cause of action for which relief could be granted under the Act.

Stripped of the pure conclusion that trade and commerce has been restrained, the sum of the facts in the complaint totals a charge of suppression of the Chicago trade of applying plastering materials and nothing more. But this

court said in *Mandeville Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234, that the Sherman Act is not concerned with a situation "in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented." Thus we submit the complaint here is fatally defective.

C.

Neither the reasoning nor precedent relied upon by the Government can excuse or cure the complaint's failure to properly allege a restraint of commerce in violation of the Sherman Act.

We have urged that the complaint is defective because the activities of the defendants are local in character and there are no allegations showing that the alleged restraints on those activities substantially and adversely affect interstate commerce. The Government seeks to avoid the necessary consequence of such patent omissions in the complaint by the contention that the installation of plastering materials is so intertwined with the sale of plastering materials that a factual allegation of restraint upon the former entitles it to draw a legal conclusion of restraint upon the latter.[14] The complaint does allege that installation of plastering materials is integrally related to the sale and flow of plastering materials *for installation.* This allegation, however, does not require or lead to the conclusion that *any* restraint on installation necessarily affects that flow, let alone substantially or adversely. The particular restraints set out in the complaint in No. 440 are nowhere alleged to have reduced the total number of plastering contractors in Chicago, let alone reduced such number to

14. Government's brief, No. 439, pp. 16-25. The argument is not made in connection with the plastering industry but is made in No. 439 and then incorporated by reference into the Government's brief, No. 440, at pp. 11 and 14.

a point where they could not promptly handle the sum total of all plastering requirements in Chicago. Under such circumstances the allegations of restraint upon installation simply do not pose any effects on price, flow or marketing of the goods installed. A restraint upon the installation of goods may or may not cause a restraint upon commerce in the goods. We submit that this complaint, which describes merely the former, cannot without alleging more be said to have charged the latter.

Apparently as a substitute for allegations showing an effect upon the flow or price of plastering the Government suggests that the conspiracy in No. 440 "* * * like that in No. 439, substantially limited the outlets within the Chicago area for interstate sales and shipments."[15] We most respectfully submit that this comparison is grossly unfair and manifestly untrue. The alleged limitations upon those who might do lathing work in Chicago are not within gunshot of the restrictions alleged to exist in the instant case. In No. 439 the defendants are charged with consciously reducing the number of lathing contractors in Chicago by racial restraints, nepotism and a freezing of the number of plastering contractors who may engage in the trade of lathing.[16] Further, those defendants are alleged to have assigned particular lathing contractors to particular plastering contractors,[17] thus limiting a plastering contractor's customers for lath and absolutely eliminating any competition of any sort between lathing contractors. And finally it is alleged that as a result of the lathers' conspiracy, the number of lathing contractors in the Chicago area has been reduced from 95 to 36.[18] Nothing even re-

15. Government's brief, No. 440, p. 14.
16. Government's brief, No. 439, pp. 9-11.
17. Id. No. 439, pp. 9-11.
18. No. 439, Par. 29(a), R. 9.

motely comparable to these charges is found in the complaint at bar.[19]

The allegations in the instant complaint touching upon a restriction of outlets or restraints among the contractors are in sharp contrast to those in No. 439. It is here alleged that only those who have been members of Local No. 5 for five years may become plastering contractors, and that the defendants have excluded out-of-state plastering contractors from Chicago.[20] These allegations, at best, describe merely a limitation upon increase in the number of contractors and, consequently, outlets for plastering materials in Chicago. Although not clearly articulated in either of its briefs, the Government seems to be saying that the defendants offend the Sherman Act because of the limitation upon possible increase in the number of local outlets for plastering goods.[21] A number of decisions are cited[22] to support this contention that a limitation upon the possible increase of retail outlets violates the Sherman Act. None of the cases relied upon holds that the Sherman Act is offended when the *only* purpose and effect of the conspiracy is to limit an increase in local retail outlets for a commodity. Such a proposition is utterly inconsistent with the decisions of this court that construction as such

19. Throughout the Government's brief in No. 440 there are constant, and to us confusing, references to its brief in No. 439. Because of the many important differences in the two complaints, much that is said in the Government's brief in No. 439 has no application or relevancy to No. 440. In many respects it would seem that the Government is attempting to bolster its case in No. 440 by confusing it with No. 439. If there is any relationship between this case and No. 439, it is that the plastering contractors were one of the victims of the alleged lathing conspiracy.

20. Pars. 20, 22-28, R. pp. 6, 7.

21. See Government's brief, No. 439, pp. 27, 28.

22. Id., No. 439, p. 28.

is not within the Sherman Act, for the natural result of the acts of the defendants considered in such cases was always to restrict local outlets for a commodity. In each of the cases relied upon by the Government, however, there was something in addition to restriction of outlets that clearly brought the conspiracy into a forbidden field.

Thus in *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904), the first case cited by the Government, the defendants rigged the price of an interstate commodity and also boycotted out-of-state shippers of the commodity. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20 (1912), also involved defendants who rigged the price of an interstate commodity, while *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600 (1914), was a suit against defendants who blacklisted particular out-of-state lumber dealers, preventing them from marketing their product across state lines. In short, all three of these cases involved allegations or proof of price fixing, exclusion of interstate commodities from a local market, or both.

The next case relied upon by the Government, *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (1941), was a conspiracy of manufacturers engaged in interstate commerce to drive from the national market certain competing manufacturers and their product. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944), is also inappropriate here as the conspiracy involved distributors of films in interstate commerce and exhibitors who had combined to impose restrictions on the distribution of that film to theaters in several states. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), concerned defendants engaged in the taxicab business in Chicago who had successfully excluded competing cab companies from operating in the Chicago area. Having obtained this local monopoly, the defendants were alleged to have excluded

from the Chicago market all taxicabs except those manufactured by one of the defendant conspirators.

In *Lorain Journal Co.* v. *United States,* 342 U. S. 143 (1951), the defendant newspaper attempted to drive from business a local radio station. Had its efforts been successful, the interstate flow of electrical transcriptions, national radio advertising and radio news would not only have been disrupted, but completely excluded from any outlet and from the effective listening area of the broadcasting company. The *Associated Press* v. *United States* case 326 U. S. 1, (1945), involved an attempt by 1200 newspapers to stifle competition in the interstate business of collecting and disseminating news. The court found that the publishers who were part of the agreement subjected themselves to the control of the defendant association in the carrying on of this interstate business. Thus these two cases also offer no support for the proposition that merely by alleging a limitation upon the increase in number of local outlets for a commodity, a cause of action under the Sherman Act is set forth.

The Government briefly suggests that the alleged exclusion of out-of-state plastering contractors is in and of itself a burden upon interstate commerce.[23] It is difficult to see the pertinency to this case of an alleged exclusion of out-of-state plastering contractors in view of the Government's assertions that the complaint is concerned with a restraint upon interstate commerce in plastering materials.[24] If there is a restraint upon the materials, because of an alleged restriction of the number of local outlets for plastering goods, it is completely irrelevant as to where those local outlets might or might not be domiciled.

The Government's contention is bottomed on the conclu-

23. Government's brief, No. 440, p. 12.
24. Id., No. 440, pp. 2, 4.

sion that such contractors are in interstate commerce. The requisite ultimate facts to support that conclusion are not alleged. They are said to place orders "from" their home offices for the shipment of materials to job sites in different states (Par. 18, R. 5). But it is not alleged where they place such orders or whether such placing involves the crossing of state lines. It is averred that they arrange for financing from their home offices; but again it is not alleged that such arrangements are across state lines.

The only interstate activities alleged are that such contractors from their home offices transport mechanics and supervisory employees to job sites in other states and exercise "control and supervision" over contract performance in other states (Par. 18, R. 5). But these two activities do not constitute trade or commerce in the sense that either of those terms are used in the Sherman Act.

Men are not articles of commerce. Any contention that a restraint which decreases a flow of men is a violation of the Sherman Act is totally without precedent and contrary to all principles of our jurisprudence. See *Spears Free Clinic and Hospital* v. *Cleere*, 197 F. 2d 125 (C. A. 10, 1952). If restrictions upon the right of an individual to enter a state and ply his trade do exist, it is the civil rights statutes concerned with constitutional guarantees in that regard, rather than the Sherman Act concerned with commercial competition, that are offended. See *United States* v. *Williams*, 341 U. S. 70 (1950); Act of June 25, 1948, c. 645, 62 Stat. 696, Title 18, U. S. C., § 241.

Aside from the fact that a possible decrease in the use of interstate media as a result of the alleged restraint on supervision and control does not involve commercial competition as contemplated in the Sherman Act, the sum of the facts alleged here falls far short of the requisite ones for a determination that a substantial and adverse re-

straint has been accomplished or attempted. For all that appears in the complaint, the restraints of commerce affected are so insubstantial and insignificant as to be beneath the dignity of the anti-trust laws. Cf. *United States* v. *Women's Sportswear Mfg. Ass'n,* 336 U. S. 460, 462; *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219, 234; *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293, 297-298; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 494-495.

With the exception of *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533 (1943), all the decisions cited by the Government to support its contention that out-of-state contractors are within interstate commerce are Labor Board cases.[25] The Labor Board cases are not appropriate in this aspect of the anti-trust field.[26] The *Underwriters* case does not support such an assertion since at the very outset of that decision the court defined the scope of its opinion indicating it would only deal with the question of whether or not insurance ever fell within the Sherman Act. It was not even contended there that the insurance companies did not do an interstate business. (322 U. S. 533, 536-537.) In addition, the indictment there involved set out "in great detail" the total activities of the defendants. These "constituted a single continuous chain of events, many of which were multistate in character, and none of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines." (322 U. S. 533, 537.) These allegations are as day to night in comparison with the single short paragraph in the present complaint on which the Government posits its conclusion that out-of-state contractors are engaged in interstate commerce. The few

25. Government's brief, No. 440, p. 13.

26. See pp. 35-36 *infra.*

decisions that have considered whether or not the origin of a contractor is controlling in determining whether or not he is engaged in commerce have rejected such a test. *Browning* v. *Waycross*, 233 U. S. 16 (1914); *Kansas City Steel Co.* v. *Arkansas*, 269 U. S. 148 (1925). We therefore submit that on the present complaint those who might enter the Chicago area to perform plastering contracts are not within commerce, and any discussion of their alleged exclusion is not germane to the only issue before this court of whether or not the complaint charged a restraint upon the flow of plastering materials.

Another alleged substantive act said to burden commerce is the alleged agreement among Association members to do no work on a job where the general contractor has an unresolved dispute with a plastering contractor. It is noteworthy that there is a signal failure to allege how frequently the defendants have refused to work for a general contractor with an unresolved dispute, or how frequently such unresolved disputes occur, or that the general contractors are themselves within commerce. The contention that commerce is burdened by this alleged act[27] is apparently made solely upon the authority of *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (1930), a case concerning a group of defendants engaged in interstate distribution of films who agreed to boycott particular exhibitors. The net effect of the case's holding is only that interstate distributors cannot agree among themselves not to sell to a particular individual, and we submit it is inapposite here.

The last alleged act the Government addresses itself to is the requirement that a plastering contractor obtain the approval of the defendant union before altering its membership, management or form of business organization.

27. Government's brief, No. 440, pp. 14 and 15.

There is a glaring lack of allegations charging that such approval is arbitrarily or capriciously withheld. In an effort to demonstrate that this alleged act offends the Sherman Act by burdening commerce, however, the Government cites three cases, *Sugar Institute, Inc.* v. *United States,* 297 U. S .553 (1936); *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30 (1930); *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208 (1939),[28] all of which involved interstate dealers in a commodity who combined to restrain competition among themselves by offering uniform conditions of sale. It is difficult to see the relevancy of these cases to a requirement that a union approve proposed changes in its employer's organizational structure if it is to continue to supply the employer with journeymen.

The precedent cited by the Government to sustain its complaint here, for the most part falls into three groups—recently instituted actions by it against the building trades, decisions that purportedly destroy the *Levering* and *Industrial Assn.* decisions as precedent, and decisions affirming a finding of the National Labor Relations Board that it has jurisdiction over particular unfair labor practices. The first group of cases, cited in No. 439,[29] the recently instituted prosecutions by the Justice Department, is offered to this court to demonstrate there is both need and precedent for permitting federal regulation of the local building trades. Suffice to say in answer to this line of "authority" that a more classic example of attempting to lift oneself by his own bootstraps is not to be found.

The first case in the group of decisions cited to soften the impact of the *Levering* and *Industrial Assn.* decisions, is *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S.

28. Government's brief, No. 440, pp. 15 and 16.
29. Government's brief, No. 439, pp. 23 and 24.

293 (1945), and the Government quotes from that opinion as follows:[30]

> It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce.

We submit that this language patently applies and should control here. This is just such a case of local conduct insulated from the operation of the Anti-Trust laws. Here if ever are defendants with purely local aims: to place artificial limitations on the increase in the number of individuals who might install plaster in Cook County; to restrict the right of contractors to alter the form of their business organization; and to limit competition among themselves where one of their number has a dispute with a general contractor. Here, if ever, are defendants not motivated by the purpose of restraining commerce. Nowhere is it alleged that they attempted in any way to affect the price or flow of plastering materials. It is more than passing strange that the Government should find comfort in *Frankfort Distilleries.*

The other cases cited by the Government in its effort to circumvent the effect of the *Industrial Assn.* and *Levering* cases are equally wide of the mark.[31] *Ramsay Co.* v. *Bill Posters Assn.,* 260 U. S. 501 (1923), was a nationwide conspiracy of individuals who sought to fix prices and eliminate competition in their interstate business of advertising. *Mandeville Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948), involved a conspiracy to fix the price

30. Government's brief, No. 439, p. 31.
31. Id., No. 439, p. 31.

of a commodity destined for interstate commerce—beet sugar. *Wickard* v. *Filburn,* 317 U. S. 111 (1942), is not even an anti-trust case. It involved the constitutionality of the Agricultural Adjustment Act of 1938. Dealing as it does with a question of Congressional power, its relevancy here is obscure.

The third group of decisions cited by the Government, the Labor Board cases, apparently are used because of the complete absence of any Sherman Act case holding local building operations to be in and of themselves within the anti-trust laws. The various decisions affirming a finding by the National Labor Relations Board that it had jurisdiction pursuant to the Wagner Act or the Taft-Hartley law over a particular unfair labor practice are used here to support two propositions: First, that the activity of constructing houses is within interstate commerce,[32] and Second, that plastering contractors not domiciled in Illinois but who might work in Illinois are within interstate commerce.[33] We submit that a decision by this court sustaining the National Labor Relations Board's jurisdiction or the power of Congress to confer it is simply not in point in the present aspect of the anti-trust field. "Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate." *Polish Alliance* v. *Labor Board,* 322 U. S. 643, 647 (1944); *Labor Board* v. *Jones & Laughlin Corp.,* 301 U. S. 1, 31 (1936), and *Labor Board* v. *Fainblatt,* 306 U. S. 601, 607 (1938). Such, however, is not true in the anti-trust field where activities restraining trade that constitutionally might be regulated by the Congress are without the scope of the Sherman Act either because of a lack of substantial effect upon commerce or because of the

32. Government's brief, No. 440, p. 15.

33. Id., No. 440, p. 13.

nature of the business or industry involved. *Toolson* v. *New York Yankees, Inc., et al.*, No. 18, this Term, decided Nov. 9, 1953; *United States* v. *Women's Sportswear Mfg. Assn.*, 336 U. S. 460, 462 (1949); *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 297 (1945); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 486 (1940).

An attempt to apply Sherman Act law to *National Labor Relations Board* v. *Denver Building Council*, 341 U. S. 675 (1951), one of the cases relied upon by the Government, illustrates the manifest absurdity of citing Labor Board cases in the present aspect of the anti-trust field. In that case the amount of commerce that occasioned exercise of the Board's jurisdiction was $2,300. Certainly not even the Government would contend that if the net result of this alleged conspiracy was to restrain $2,300 worth of plastering the conspiracy would be cognizable by the Sherman Act. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940). We submit that the Government's use of Labor Board cases only heightens the total lack of precedent for the proposition that construction activities within a particular state constitutes or substantially affects trade or commerce within the Sherman Act. Cf. *United States* v. *Five Gambling Devices*, Nos. 14, 40 and 41, this Term, decided Dec. 7, 1953.

Conclusion.

We submit that because the complaint totally lacks allegations describing an effect either upon the price, quality, volume or marketing of plastering goods—the only interstate commerce in this case—the language of Mr. Justice Stone in his concurring opinion in *United States* v. *Hutcheson*, 312 U. S. 219, 240 (1941) is most pertinent:

> * * * Precisely as in *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, where a local building strike with like consequences was held not to violate the Sherman

law, there is wanting here any fact to show that the conspiracy was directed at the use of any particular building material in the states of origin and destination or its transportation between them 'with the design of narrowing or supressing the interstate market,' each of which were thought to be crucial in *Bedford Cut Stone Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37, 46-47.

See also *United Leather Workers* v. *Herkert*, 265 U. S. 457 (1924) and the *Second Coronado* case, 268 U. S. 295, 310 (1925).

For the foregoing reasons we respectfully suggest that the judgment below dismissing the complaint must be affirmed.

Respectfully submitted,

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